



MINERAL POLICY

C E N T E R

*Protecting
Communities
and the
Environment*

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HOUSE RESOURCES COMMITTEE
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES
“THE TOXIC RELEASE INVENTORY
AND ITS IMPACT ON FEDERAL MINERALS AND ENERGY
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My name is Lexi Shultz, and I'm the Legislative Director for the Mineral Policy Center, a non-profit, non-partisan group created to protect communities and the environment from the impacts of mining pollution.

The Toxics Release Program Has Been Highly Popular and Useful for Communities

I want to thank the Subcommittee for the opportunity to testify on the critical importance of full mining industry reporting to the Toxics Release Inventory program, which implements the Public's Right to Know.

What I will talk about today is the fact that hardrock mining, the nation's top toxic polluter over the last four years, releases into communities and the environment potentially dangerous chemicals like arsenic, mercury and lead, and the public has a right to know about it. As such, the mining industry's efforts to hide this pollution from the public should be halted.

The Toxics Release Inventory Program, or TRI, was established in 1986 by the Emergency Planning and Community Right-to-Know Act (EPCRA) and is administered by the Environmental Protection Agency (EPA). TRI requires industrial facilities to annually disclose to the public the volume and type of pollutants they have discharged into the air, water, or land or have transferred to other sites for incineration, recycling or disposal.

The TRI gives citizens information that they can use to protect their communities and ensure that mining and other companies behave in an environmentally responsible manner. As you may be aware, the right for the public to know about toxic chemical releases enjoys widespread support among the public, its elected representatives, and even in the courts. As Governor Christie Todd Whitman stated on May 23, 2002, "The Toxics Release Inventory is a powerful tool to help citizens assess local environmental conditions and to help them make decisions about protecting their environment."¹

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¹ http://www.epa.gov/epahome/headline_052302.htm

TRI is a highly useful public information tool. Companies face no penalty for their reports, and are not required to take any actions to reduce their pollution. Nevertheless, some industries have voluntarily chosen to reduce their pollution because of the advantages of the resulting public good will. Moreover, the information provided to communities has helped them ascertain what steps to take to protect themselves by, for example, pushing to have environmental laws enforced against non-complying operations.

Mining – The Nation’s Top Toxic Polluter for Four Years in a Row

The hardrock mining industry first started reporting its toxic releases to the EPA in 1998, and the information was first made available to the public in 2000. Since then, the TRI has shown that the hardrock mining industry is the nation’s top toxic polluter. Last year alone, the hardrock mining operations reported releases of 2.8 billion pounds of waste overall for 2001 – nearly half (46%) of all toxics released by all industries combined.² This amount included more than 335 million pounds of lead, 4 million pounds of mercury and 365 million pounds of arsenic.³ The top ten largest polluters in the U.S. are mine sites, according to the TRI.

Of course, 1998 was not the first year that mining operations started releasing toxic chemicals into the environment. In fact, it’s quite possible that the hardrock industry was the nation’s top toxic polluter for years or decades before that. But before that time citizens didn’t have access to the information they could use to protect themselves from mining toxins in their communities.

Unfortunately, ever since they were first required to report to the TRI, the hardrock mining industry has been fighting to put the public back in the dark about mining toxic releases. Back in 1998, before any mining TRI report came out, the National Mining Association sued the EPA in order to block any mining pollution data from being made public.⁴ The NMA challenged everything it could think to challenge, including the notion that the public right-to-know laws should apply to mining operations at all. The NMA also petitioned EPA in 1998 to exempt the bulk of mining waste from the TRI program by classifying it as “overburden.” In 1999, Barrick Gold, one of the biggest mining companies, joined the NMA in suing the EPA to get out of reporting all of its pollution.

I want to emphasize that what we are talking about here is simply information - information that the public has a legal right to – but nothing more and nothing less than information. While my organization aims to help communities deal with the environmental and other impacts of hardrock mining pollution, and to work to reduce that pollution wherever possible, that is *not* what this hearing is about, or what the Toxics Release Inventory is about. Instead, the issue here is that mining operations release billions of pounds of toxic chemicals into the environment every year, the public has a right to know about it under the law, but the mining industry wants to hide it. What are the National Mining Association, Barrick Gold, and other like-minded operations so afraid of? Apparently, according to their testimony, they are extremely proud of their record. They have an opportunity to garner good public will by being forthright and forthcoming about their toxic release information. Instead, they are fighting it all the way.

² <http://www.epa.gov/triexplorer>

³ <http://www.epa.gov/triexplorer>

⁴ http://www.epa.gov/tri/lawsandregs/nma_lawsuit_fact_sheet.htm

Mining Pollution Harms the Environment

Because precious metals exist in microscopic quantities in ore, most modern mines dig enormous open pits to extract huge volumes of rock and ore, and then use toxic chemicals like cyanide to leach out the desired metals. The crushed, ground and processed rock is then dumped into enormous piles, called tailings piles, which are usually stored above ground in containment areas or ponds. Waste rock, unprocessed rocks that do not contain a high enough grade of ore, are often crushed and piled hundreds of feet high, exposing the heavy metals contained within to the elements. These waste rock piles and tailings piles contain heavy metals such as arsenic, cadmium, lead and mercury. The environmental consequences of these enormous operations are often devastated landscapes, damaged wildlife habitat, and significant amounts of water pollution.

Water Pollution

Mine waste has contaminated more than 40 percent of the headwaters of western watersheds, according to the Environmental Protection Agency.⁵ While some of that contamination is from historic mining, modern mining operations continue to cause water pollution and often violate environmental laws such as the Clean Water Act. The EPA's online Enforcement and Compliance database shows that, in Regions 8, 9, and 10, twenty six major mine facilities violated the Clean Water Act in the past two years.⁶

Kennecott's Bingham Canyon Mine in Utah is a good example. The mine has polluted 72 square miles of groundwater in the Salt Lake City Area.⁷ In the past two years alone, Bingham Canyon Mine has racked up 6 Clean Water Act violations at its Utah site. In one case, the mine released highly toxic mercury at levels 900 percent over permitted limits.⁸ The mine also released 695 million pounds of toxic waste in 2001—including 21 million pounds of arsenic and 91 million pounds of lead – making it the largest toxic polluter in the U.S., according to the EPA.⁹

Phelps Dodge Corporation's dormant Christmas copper mine near Winkelman, Arizona is another good example. Phelps Dodge settled with the EPA for \$105,000 in fines this year, after discharging pollutants at levels harmful to aquatic life into a tributary of the Gila River. Phelps Dodge had also failed to report its discharges of copper and sulfides, in violation of their Clean Water Act discharge permit.¹⁰

The Cripple Creek mine in Colorado also exceeded pollution limits 22 times over a three year period from 1996-1999, releasing zinc, copper and cyanide into streams that feed the Arkansas

⁵ Liquid Assets 2000: America's Water Resources at a Turning Point, May 2000, Environmental Protection Agency

⁶ The Environmental Protection Agency's Enforcement & Compliance History Online (ECHO) database, <http://www.epa.gov/echo/>

⁷ <http://www.epa.gov/region8/superfund/sites/ut/kennes.html>

⁸ The Environmental Protection Agency's Enforcement & Compliance History Online (ECHO) database, <http://www.epa.gov/echo/>

⁹ <http://www.epa.gov/triexplorer>

¹⁰ <http://www.epa.gov/fedrgstr/EPA-WATER/2002/December/Day-19/w31980.htm>

<http://www.minesandcommunities.org/Action/press111.htm>

River.¹¹ In 2002, Cripple Creek and Victor Mining Company settled with the Environmental Protection Agency, after attempting to claim that much of the pollution coming from their mine site was not the company's responsibility.

Acid Mine Drainage

Another major water pollution problem from hardrock mines is created by acid mine drainage. Acid mine drainage develops when mining operations expose sulfur-laden rock to air and water, leading to the formation of sulfuric acid. This acid is in itself harmful to water bodies and aquatic life, but it also dissolves and mobilizes many kinds of toxic chemicals that are reportable under the TRI, such as iron, copper, aluminum, cadmium, arsenic, lead and mercury. Even in trace amounts, these substances can be toxic to humans and wildlife. Carried in water, the metals can travel long distances, contaminating streams and groundwater. The streams most seriously affected by acid mine drainage and heavy metal contamination are biologically "dead."

The Gilt Edge Mine, located in the Black Hills of South Dakota, is an example of a mine with toxic pollution problems created by acid mine drainage. Acid drainage from the Ruby Gulch waste rock pile has leached pollutants like arsenic, cadmium, cobalt, copper, lead and zinc, leading to extensive groundwater contamination at the site.¹² The mine was placed on the Superfund National Priorities List on December 1, 2000, after the bankruptcy of the Dakota Mining Company.

In September of 2000, the bones and bodies of more than 100 birds were found alongside highly acidic tailings ponds during a routine inspection of the Phelps Dodge Tyrone mine, one of New Mexico's largest copper mines. The now-inactive ponds of milled waste rock or tailings tested at least as acidic as vinegar, which has a pH of three to four. State and federal officials said the bird die-off appeared to be the largest ever associated with mine-water pollution in the state.¹³

Reclamation Failures

The mining industry also touts its reclamation record - its ability to clean up closed mines, but the evidence doesn't support this claim. Currently, 87 abandoned hardrock mining sites are so polluted that they are included on the Superfund National Priorities List. Moreover, many non-Superfund mine sites remain unreclaimed even years after the mine has shut down. These sites are often left for taxpayers to clean up when mining companies wind up without the resources for full reclamation. According to the Center for Science in Public Participation, potential taxpayer liability at currently operating mines could be more than \$12 billion.¹⁴ Cleanup costs for abandoned mines could be \$32 billion to \$72 billion more.¹⁵

¹¹ Hartman, Todd. "Mine To Pay EPA \$125,000." Rocky Mountain News 13 September, 2000.

¹² Source: Summary of the Large Scale Gold Mining Industry in the Black Hills. Prepared by the South Dakota Department of Natural Resources and the Environment, 2001.

¹³ September 20, 2000, Wednesday Copyright 2000 Albuquerque Journal, Santa Fe, New Mexico

¹⁴ Kuipers, J., *Putting a Price on Pollution*, Center for Science in Public Participation, March 2003.

¹⁵ Mineral Policy Center, *Burden of Gilt*, June 1993

One example, although there are many, is the Zortman-Landusky Gold mine, owned and operated by Pegasus Gold Corp. and located in Little Rocky Mountains of north-central Montana. Pegasus Gold went bankrupt in 1998, leaving state taxpayers with millions of dollars in cleanup expenses. In 1982, irresponsible management of cyanide solution resulted in 6 separate spills and leaks, which contaminated groundwater and poisoned local drinking water sources. Today, half of all streams in the area are polluted with acids and heavy metals from the mine.¹⁶

Toxic Chemicals Released by Mining are Known to Be Harmful to Public Health

Toxic mine pollution contains chemicals that are known to have public health threat. Among the toxic chemicals reported by the mining industry to the TRI are cyanide, arsenic, mercury, lead and selenium. Americans have the right to know about releases of these and other chemicals so that they can determine whether their health or their communities may be at risk. Without such information, it would be impossible to determine such risk. Here are some of the known characteristics and potential health impacts of these chemicals:

Cyanide solutions readily bond with gold, silver and other metals, which is why the mining industry uses it to leach ore from large quantities of rock. Cyanide is also *highly* toxic. Cyanide poisoning can occur through inhalation, ingestion and skin or eye contact. One teaspoon of a 2% solution can kill a person.¹⁷

Over the years, cyanide spills have polluted rivers and streams throughout the west, damaging aquatic life and threatening public health. The defunct Grouse Creek mine in Idaho is a classic example - the Grouse Creek mine, located adjacent to the largest wilderness complex in the lower 48 states, was heralded as a "state of the art" mine when it began operations in 1994. Less than a year later, cyanide was detected in groundwater and Jordan Creek - a stream identified by the federal government as critical salmon habitat. By the time, Grouse Creek temporarily suspended operations in 1997, Hecla had 258 violations of their discharge permit. As a result of on-going violations, the Forest Service posted signs along Jordan Creek which warned, "Caution, do not drink this water."¹⁸ In July 1999, fearing a catastrophic release of cyanide and heavy metals from the Grouse Creek tailings impoundment, the Forest Service initiated a "time critical removal action" under CERCLA.¹⁹ Water quality problems continue at the mine today, as the federal government struggles with reclamation.

¹⁶ Final Supplemental Environmental Impact Statement for Reclamation of the Zortman and Landusky Mines, Phillips County, Montana. Prepared by Bureau of Land Management and Montana Department of Environmental Quality, December 2001.

¹⁷ Medical Toxicology, Ellenhorn & Barceloux, Elsevier Science Publishing Co., New York City, N.Y., 1988

¹⁸ Press Release, USDA Forest Service, Salmon-Challis Forest. July 6, 2000

¹⁹ Grouse Creek Removal Action Memorandum, Jack Blackwell, Regional Forester, USDA Forest Service Intermountain Region. July 26, 1999., Engineering Evaluation/Cost Analysis for Non Time Critical Removal Action at the Grouse Creek Mine, Custer County. Prepared by Hecla Mining Company, July 17, 2002., Hardrock and Phosphate Mining In Idaho, a report by the Idaho Conservation League and Boulder White Clouds Council, March 2002

Arsenic is a powerful poison that at high oral dosages can cause severe illness and death. At lower doses, arsenic can cause pain, bleeding, nausea, vomiting, and can also damage the nerves, leading to headaches, lethargy, seizures and coma.²⁰ Long-time exposure to arsenic can cause abnormal heart rhythm, blood vessel damage, and liver damage. Arsenic is also a known carcinogen, according to the Department of Health and Human Services. According to a February 15, 2001 Associated Press story, border patrol agents became sick from hazardous materials including arsenic and lead after patrolling near a defunct copper smelter in Douglas, Arizona. The agents complained of nausea, headaches and difficulty breathing.

Mercury is a potent neurotoxin. Children and infants exposed to mercury often experience delays in developing motor skills like walking and talking. The EPA recently expressed concern about an increase in women with elevated blood mercury levels, as this dangerous toxin can transfer through a placenta to a developing fetus, or to a newborn through breastfeeding – resulting in exposure at critical developmental ages.²¹

Lead can affect almost every organ and system in the body.²² Breathing or swallowing lead can damage the nervous system, kidneys and especially the immune system. Exposure to lead can permanently damage a child's brain and can impede growth and cause learning difficulties, and hearing loss. For mothers, high levels of lead exposure can cause miscarriages and premature births. Lead can also cause headaches, irritability, disturbed sleep and poor memory and concentrations. A recent National Institute of Health study, published in April in the New England Journal of Medicine, suggests that there is no acceptable level of exposure to lead. According to the study, any amount of lead can cause intellectual impairment in children, and greater damage seems to occur at levels of lead that have previously been regarded as safe. Furthermore, the effects are permanent. Attempts to remove lead from children can reduce blood levels, but do nothing to restore a child's lost intelligence.

Mining companies' lead pollution has contaminated water supplies and homes throughout the Coeur d'Alene-Spokane river basin in Idaho and Washington. Virtually all of the 179 children living within a mile of the abandoned Bunker Hill silver mine (a Superfund site) were found to have brain-impairing levels of lead in their blood.²³ And according to the U.S. Geological Survey, a half-million pounds of lead-contaminated mine sediment landed in Lake Coeur d'Alene every year from 1999 to 2001, and another two dozen tons of that sediment traveled down the Spokane River. Local health officials have posted signs at beaches along the lake and river and have warned people that rainbow trout and mountain whitefish contain dangerous levels of lead.

Selenium is a metal commonly found combined with silver, copper and other metals. In June 2003, at an old hardrock mine in Idaho, more than 300 sheep died from selenium poisoning after grazing near the mine for a week.²⁴ In humans, overexposure to selenium can cause hair loss,

²⁰ <http://www.atsdr.cdc.gov/tfacts2.html>

²¹ <http://www.epa.gov/waterscience/fishadvice/advice.html>

²² <http://www.atsdr.cdc.gov/tfacts13.html>

²³ <http://www.atsdr.cdc.gov/testimony/testimony-1995-05-12.html>

²⁴ <http://www.agweekly.com/commodities/sheephog/index.asp?StoryID=183>

liver damage, dizziness, fatigue, fluid in the lungs and severe bronchitis, along with painful skin rashes.²⁵

These are by no means the only toxic chemicals released by the mining industry – a more complete list of toxic chemicals reported by the mining industry on the TRI, along with their characteristics and potential health impacts is attached.

Hardrock Mining Pollution: Nothing Natural About It

One myth the National Mining Association and individual mining companies like to use is that the toxic chemicals they release into the environment are “naturally occurring” and thus should not be reported on the TRI. This argument is erroneous.

Some chemicals are added to the environment by the mining industry directly – such as cyanide and sulfuric acid. Other chemicals may be found naturally in rock, but *would never have been exposed to the environment if not for the actions of the mining industry*. After all, there is nothing natural about an open-pit mine. Nature does not dig open pits thousands of feet deep and wide, grind and dump huge piles of rock, crush piles of ore and pour chemicals over it in order to extract metals. The rock, and the toxic chemicals therein, undergo both mechanical and chemical changes from the activities that occur during mining and the exposure of the rock to air and water.

In particular, acid mine drainage forms because mining operations expose sulfur-laden rock to the air and water. In turn, this acid can leach heavy metals and other toxins into streams, rivers, lakes and drinking water. For example, at least 8 miles of the Red River in northern New Mexico are biologically dead because of acid mine drainage at the Molycorp molybdenum mine. Over the last 30 years or so, widespread acid mine drainage and heavy metal contamination has leached out of its waste rock piles into the Red River, which was once a blue-ribbon trout fishery.²⁶ Since this large-scale operation began, the nearby town of Questa has seen the River turn milky blue from aluminum coating the riverbed. Copper, zinc, lead, cadmium and silver have been detected at chronic and acute levels along the twenty-mile stretch of the River below the mine. In addition to water contamination, dust containing lead and other pollutants from enormous molybdenum tailings storage ponds blows over the town of Questa. Because of contaminated dust blowing from the tailings piles onto students at a local high school, Molycorp eventually paid to have the high school relocated.²⁷

It is this sort of pollution that the NMA claims is “naturally occurring” and thus would be “misleading” for the public to have information about. This is exactly the sort of pollution that never would have occurred without the mine and that the public has a right and a need to know about. That is what makes the TRI such a valuable tool.

Communities Put the TRI Information to Good Use

²⁵ <http://www.atsdr.cdc.gov/tfacts92.html>

²⁶ <http://www.nmenvirolaw.org/cases/molycorp.htm>

²⁷ <http://www.amigosbravos.org/molycorpwatch/background.html>

Throughout the country, communities learn from the information provided under the TRI and use it to improve their quality of life. In Alaska, for example, the TRI demonstrated how pollution from the Greens Creek mine is affecting the Admiralty Island National Monument. Kennecott mining company is proposing to expand its waste piles for this mine, and without the TRI, there would be no complete picture of how that could potentially further impact the National Monument. Local citizens are now seeking to enforce a bond for the mine that will be adequate to ensure full future cleanup.

In Nevada, TRI data showed that Nevada's mines emitted 13,000 pounds of mercury into the air in 1998, or 4% of the entire releases in the U.S.²⁸ Mercury is not a localized pollutant, but can travel and deposit into water far from its source. A local public interest group is now attempting to address this problem through the prevention of significant deterioration program under the Clean Air Act, which essentially seeks to keep air clean in rural areas of the country.

The Mining Industry's Attempts to Block the Public's Right to Know

Unless steps are taken to protect the Public's Right to Know, through the EPA's proposed rule-making or other measures, this invaluable data may be lost. The mining industry may yet be successful in its attempts to use the courts to hide its pollution from the public.

In the National Mining Association 1998 case, *NMA v. EPA* (Civil No. 97-N-2665; D. Colo.), the NMA challenged the TRI program in three ways. First, it said that the EPA had no authority to regulate mining operations under the Public Right to Know laws. The District Court of Colorado rejected this argument, holding that mining facilities are not exempt from the law. Second, the NMA argued that mining facilities shouldn't have to report toxic chemicals released into leach pads. Again, the District Court ruled against the NMA on this point, holding that mining operations cannot get out of reporting toxic releases to land. Finally, the NMA argued against reporting toxic materials resulting from the "extraction or beneficiation" of ores - taking ore out of the ground and getting the metal out of it, essentially - because such activities aren't "processing" as that's defined under the Public Right to Know laws.

The Court initially accepted the NMA's third argument, but ultimately clarified that, while "extraction and beneficiation" may not be processing, that didn't necessarily mean that such activities weren't manufacturing or some other regulated activity under the Public Right to Know Laws. Based on that clarification, the EPA made it very clear to the NMA that there would be no changes in reporting requirements, at least until the agency could undertake a rulemaking to address the issue. But, in a July 2, 2001 letter to the EPA, the NMA stated that it intended to ignore the EPA's directives, and that it would undertake to withhold reporting information from the public according to its own interpretation of the Court's ruling.

It is the public that will suffer because of the NMA's recalcitrance. The reported mining toxic releases from the 2001 TRI were 2.8 billion pounds – but the actual pollution may have been much higher. In 2000, mining toxic releases totaled more than 3 billion pounds, and mining

²⁸ <http://www.epa.gov/triexplorer>

practices changed little in 2001.²⁹ In light of the National Mining Associations' quarrel with the EPA's directive not to change reporting practices after the *NMA v. EPA* case, it is very possible that mining operations have reduced the reporting of their toxic pollution, but not reduced the toxic pollution itself.

In the 1999 Barrick Gold case, *Barrick Goldstrike Mines, Inc. v. Whitman* (Civ. Action No. 99-958 (D.D.C.)), Barrick raised several issues, again, each one designed to limit the amount of information the public can receive about toxic mining pollution. In April 2003, the D.C. District Court rejected Barrick's arguments that toxic chemicals that change into a slightly different form shouldn't be reported, and that toxic chemicals released as part of tailings shouldn't be reported.

Disturbingly, however, the D.C. District Court agreed with Barrick on one issue - that an EPA rule - the so-called "de minimis" exemption - could apply to toxic chemicals dumped as part of waste rock. The EPA rule was written to forgive reporting for truly trivial amounts of toxic chemicals. But Barrick argued that the rule should apply to the immense amounts of toxic chemicals released as part of waste rock, simply because these poisons make up such a small percentage of the even more mammoth amounts of waste rock that is dumped. The mining industry in the U.S. releases more than 1 billion pounds of toxic chemicals as part of the hundreds of billions of pounds of waste rock it dumps every year. That is vastly more than a trivial amount of toxic pollution, and thus was not meant to be exempt from reporting under the EPA's "de minimis" rule. Unfortunately, the court looked at the language of the EPA "de minimis" rule rather than its intent, and exempted such pollution from being reported.

The implication of the Barrick case is not totally known yet, but it could mean that 1 billion pounds of toxic chemicals released by the mining industry into communities and into the environment might be hidden from public view next year. As such, Barrick's legal efforts to hide its toxic pollution from the public may be very successful.

In addition, the National Mining Association may attempt to use the Barrick decision to push the EPA to classify waste rock as "overburden," which is exempt from TRI reporting. In October 2002, EPA formally denied the NMA's previous "overburden" petition, in which the NMA had sought to expand the definition of "overburden" to include "consolidated material" such as waste rock. Because the EPA decided that "overburden" would be exempt from reporting, the NMA was seeking to exempt as much mining waste as possible from the TRI program. In denying the NMA's petition, the EPA specifically stated that waste rock would not be classified as "overburden" because there were greater than negligible amounts of toxic chemicals in waste rock. The EPA was correct - the potentially billion pounds of toxic chemicals in waste rock nationwide is far greater than negligible and should not be exempt from reporting.

Nevertheless, the NMA may use the erroneous decision in the Barrick case to re-open this petition and thus further limit the public's access to information about toxic chemicals in mining waste. Specifically, classifying waste rock as overburden would eliminate public information about Persistent Bioaccumulative Toxins such as lead and mercury. Right now, despite the Barrick decision, mining operations must report the presence of such toxic chemicals even in

²⁹ <http://www.epa.gov/triexplorer>

waste rock, because such chemicals are exempt from the EPA's "de minimis" rule. But exempting waste rock as "overburden" could put that reporting in jeopardy.

Hiding the toxic pollution from waste rock is not an academic matter. Every day, toxic chemicals leaking from waste rock pollute streams and groundwater on which families depend. For example, at the Kendall mine in the Moccasin Mountains of central Montana, waste rock piles are leaching acid and metals such as arsenic, lead, and chromium into ground water and surface water. Downstream ranching families have been forced to file suit against the mining company, Canyon Resources, for damages to their private property.³⁰ The Montana Department of Environmental Quality has determined that long-term water treatment will be needed. A report in November 2002 by Water and Environmental Technologies describes impacted groundwater as containing elevated concentrations of arsenic, barium, beryllium, cadmium, chromium, copper, iron, lead, nickel, selenium, silver, thallium, vanadium and zinc.³¹

The EPA Must Fix Mining Industry Efforts to Keep the Public in the Dark about Toxic Mining Pollution

It is the public that will suffer from the fact that mining operations seem more interested in hiding their pollution than reducing it. The EPA has in the past steadfastly defended the Public's right to know and must continue to do so in the future.

The EPA is drafting a proposed rulemaking for completion in 2004 that will address the issues raised in both the legal cases brought by the mining industry against the TRI program. It is vital that the EPA keep in mind, as it undergoes this rulemaking, the broad mandate of the Public Right to Know Law – EPCRA, which mandates that the public has the right to know about toxic chemicals – all toxic chemicals – that are being released into their environment.

As such, it is crucial that this rulemaking address several key points. First, the new rule should establish that all mining activities, from start to finish, constitute activity that is covered under EPCRA. There is nothing "natural" about an open-pit mine, and a hardrock mining operation is intended, from the first rock pulled from the ground to the last waste pile dumped, to produce a commercial product – gold and silver and other metals that will be sold into market. During this process, toxic chemicals are exposed to the environment that never would have been exposed otherwise. These chemicals have a real, immediate and long-lasting effect on communities. It is vital that the public has access to information about such pollution. As such, it is vital that the TRI apply to all toxic chemicals released by mining operations, whether those chemicals are released during digging, grinding, dumping, or any other mining activity or are released from waste rock piles, tailings piles, the open-pit or any other location on the mine site. The EPA rulemaking should clarify that the TRI applies broadly to all toxic mining releases.

Second, the EPA should make clear that the agency's "de minimis" rule was never intended to exclude from reporting chemicals that add up to large quantities. In fact, the only authority that the EPA has for a "de minimis" rule comes from the doctrine of "de minimis non curat lex" –

³⁰ Extent of Contamination Investigation Little Dog Creek Drainage, Fergus County, Montana. Prepared by Water and Environmental Technologies, November 11, 2002.

³¹ Ibid.

which means that the law does not concern itself with trivial matters. There is no authority in EPCRA for the EPA to exempt even small amounts of pollution from reporting. If the “de minimis” rule were to be applied to vast quantities of pollution, as the court in the Barrick case held, the EPA would be beyond its legal authority. The EPA cannot allow this erroneous interpretation to stand and must clarify in its proposed rulemaking that huge amounts of toxic releases are not “trivial” enough to be exempt from reporting.

In addition, the EPA should not give in to any industry efforts to have waste rock or other mine waste exempted by reporting through a new “overburden” petition.

Conclusion

In conclusion, I want to emphasize that what we have been talking about here today is the public’s right to have access to information about toxic chemical releases from mining that might have an impact on their communities, their livelihoods, their health. We have not been talking about reducing the pollution – that too is critically important, but is an entirely different issue.

And yet, the mining industry has repeatedly sued to ensure that the public is kept in the dark. It’s time for mining companies to stop fighting the program and accept responsibility, as other industries have, for the toxic chemicals they release into the environment.

In addition, the EPA should ensure that the TRI continues to work by addressing in its rulemaking the problems that the mining industry lawsuits have created.

When allowed to work, the Toxics Release Inventory is a winning program for everyone. It gives industries a chance to voluntarily control pollution and gain public good will. And it arms the public with information that they need and can use to improve their quality of life.